NORFAIZ AZLI MUHAMMAD *a*

v.

ABDULLAH YAMAN

HIGH COURT MALAYA, TEMERLOH *b*
RAMLY ALI JC
[APPEAL NO: 12-23-2000]
24 AUGUST 2001

EVIDENCE: *Fresh or further evidence - On appeal - When admissible - Principles applied - Ladd v. Marshall - Rules of the High Court 1980, O. 55 r. 5A - Whether evidence to be pleaded* *c*

The appellant as plaintiff filed a civil suit against the respondent as defendant in the sessions court for compensation and damages as a result of an accident with the respondent. The sessions judge apportioned liability of 70% on the respondent and 30% on the appellant. The appellant then filed an appeal to this court against the decision of the sessions judge. Subsequently, it came to the knowledge of the appellant that the respondent had pleaded guilty to a charge under s. 43(1) of the Road Transport Act 1987 ('RTA') as a result of the same accident at the magistrate's court. The appellant now applied for leave, at this appellate stage, to adduce that further and fresh evidence ('further evidence') and to file additional appeal records outside time. *d* *e*

Held:

[1] Fresh evidence may be admitted at the appellate stage in the High Court. Section 29 of the Courts of Judicature Act 1964 read together with s. 69(3) of the same Act and O. 55 r. 5A of the High Court Rules 1980 ('RHC') empower the court to do so. *f*

[2] In *Ladd v. Marshall* it was held that there were three conditions to be fulfilled to justify the reception of further evidence. Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive. Thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible. With the new r. 5A of O. 55 RHC, an application to adduce further evidence at appeal stage need only fulfill the first two conditions in *Ladd v. Marshall*. *g* *h*

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[3] The further evidence did not exist when the trial was concluded in the sessions court. There was no opportunity for the appellant to make use of that evidence at the trial. The only avenue left for the appellant was to rely on it at the appellate stage. In the circumstances, the court was satisfied that the further evidence would not have been obtained with reasonable diligence for use at the trial.

[3a] The sessions judge had specifically stated in her grounds of decision that the respondent was charged under s. 43(1) of the RTA and that the respondent had not pleaded guilty to the charge and that the charge was still pending. That showed that the issue of whether the respondent had pleaded guilty to the charge or not was a relevant consideration and was duly considered by the sessions judge in making her decision on the liabilities of the parties. It followed that the further evidence if true was likely to have had a determining influence on the decision of the sessions judge although it need not be decisive.

[3b] The source of the further evidence were from official documents of the court and the police. *Prima facie*, it must be presumably to be believed or in other words, it must be apparently, creditable although it need not be incontrovertible. It followed therefore that the further evidence had satisfied the two conditions under O. 55 r. 5A RHC as well as the three conditions enunciated in *Ladd v. Marshall* and accepted by the Federal Court in *Lau Foo Sun v. Government of Malaysia.*

[4] The further evidence was not a separate and distinct issue by itself. It was evidence (additional evidence) to prove negligence on the part of the respondent. Therefore, it was not necessary to plead it in the statement of claim or an amended statement of claim. It was sufficient for the appellant to plead that the accident was caused by the respondent's negligence and that was done in paras. 5 and 6 of the statement of claim. Further, it was unreasonable and illogical to get the appellant to plead it when it did not exist at the close of the trial.

[Application allowed.]

Case(s) referred to:

Chang Chong Foo & Anor v. Shivanathan Perumal [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 ***(refd)***

Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 ***(refd)***

Curwen v. James [1963] 2 All ER 619 ***(refd)***

Ladd v. Marshall [1954] 3 All ER ***(foll)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***

Lijaw They Hew v. Chua Bok Kee [1998] 3 CLJ 927 ***(refd)***

Lim Ah Toh v. Ang Yau Chee & Anor [1969] 2 MLJ 194 ***(refd)***

Mc Cann v. Sheppard [1973] 2 All ER 881 ***(refd)***
Mulholland & Anor v. Mitchell [1971] 1 All ER 307 ***(refd)***
Murphy v. Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949 ***(refd)***
Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v. Johore Builders & Investments Sdn Bhd [1996] 4 CLJ 184 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 29, 69(3)
Road Transport Act 1987, s. 43(1)
Rules of the High Court 1980, O. 55 r. 5A

For the appellant - S Sivanesan; M/s S Siva & Co
For the respondent - B Shanta Mohan; M/s VP Nathan & Partners

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:
This is an application by the appellant/plaintiff that he be at liberty upon the hearing of his appeal to adduce further and fresh evidence and to file additional appeal records containing the said new evidence outside time. The further and fresh evidence that need to be adduced by the appellant/plaintiff at the appeal stage is regarding the respondent/defendant's plea of guilty to a charge under s. 43(1) of the Road Transport Act 1987 (RTA) ie, driving without due care and attention in respect of an accident involving the respondent and the appellant. The said plea of guilty was made by the respondent at the Magistrate Court Temerloh after the trial of his civil suit in the Sessions Court Temerloh but before disposal of the appeal.

Background Of The Case
The appellant has filed his claim against the respondent at the Sessions Court Temerloh *vide* Civil Case No: 53-256-97, for compensation and damages as a result of an accident at KM 13, Jalan Temerloh – Jerantut on 31 July 1997 involving the respondent's vehicle and the appellant. At the trial of the said civil suit at the Sessions Court Temerloh, the appellant had called (8) witnesses and on 28 March 2000 the respondent had also called his witness and closed his case. The case was adjourned to enable the parties to submit their written submissions before the learned Sessions Court judge made her decision. After numerous adjournments, finally the learned Sessions Court judge gave her decision on 20 October 2000 where she apportioned the liability 70% on the respondent and 30% on the appellant.

In his evidence in court as 'SD1' on 28 March 2000, the respondent informed the court that as a result of the same accident, he was charged under s. 43(1) of the RTA 1987 at the Magistrate Court Temerloh where he had claimed trial and the case was still pending at that time. On 23 October 2000 the appellant filed an appeal against the said decision of the learned Sessions Court judge to this court. On 4 July 2000, at the Magistrate Court Temerloh, the respondent has pleaded guilty to the charge under s. 43(1) of the RTA 1987 regarding the same accident where he was fined RM800 and his driving licence was endorsed. The appellant came to know about this matter after receiving a letter from Ibu Pejabat Polis Daerah Temerloh dated 7 June 2001 upon enquiry made by his solicitors. It was confirmed when his solicitors obtained the notes of evidence and the charge sheet in respect of the case from the Magistrate Court Temerloh. From the evidence available it seems that the said fresh evidence was not in existence when both parties closed their cases at the Sessions Court Temerloh. It only existed after the close of the trial and before judgment was handed over after a few postponements; and it first came to the appellant's knowledge only on 7 June 2001, before the appeal is heard in this court.

Findings Of The Court

Fresh evidence may be admitted at the appellate stage in the High Court. Section 29 of the Courts of Judicature Act 1964 read together with s. 69(3) of the same Act and O. 55 r. 5A of the High Court Rules 1980 empower the court to do so. The RHC 1980 have just been amended *vide* PU(A) 342/2000 which came into effect on 21 September 2000 by inclusion of a new r. 5A to O. 55 which reads:

> 5A. At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
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> (a) at the hearing before the Subordinate Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence: if true, would have had or would have been likely to have had a determining influence upon the decision of the Subordinate Court.

The said O. 55 r. 5A of the RHC 1980 apparently incorporated the famous principle on this issue as enunciated in *Ladd v. Marshall* [1954] 3 All ER which has been adopted and followed by our Federal Court in *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70. The tests enunciated by Denning LJ (as he then was) in *Ladd v. Marshall* and later followed and applied by Suffian FJ (as he then was) in *Lau Foo Sun* case are as follows:

> To justify the reception of further evidence three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

There is a string of authorities to confirm that fresh evidence relating to events which occurred after trial but before disposal of the appeal can be admitted at appeal stage. (see: *Lijaw They Hew v. Chua Bok Kee* [1998] 3 CLJ 927; *Curwen v. James* [1963] 2 All ER 619; *Murphy v. Stone Wallwork (Charlton) Ltd.* [1969] 2 All ER 949; *Mulholland & Anor (by his next friend Hazel Doreen Mitchell) v. Mitchell* [1971] 1 All ER 307; and *Mc Cann v. Sheppard* [1973] 2 All ER 881). In fact, in the case of *Murphy v. Stone Wallwork (Charlton) Ltd.*, the new evidence was allowed by the House of Lords after the appeal in the Court of Appeal, but before the appeal in the House of Lords. In *Mulholland*'s case, Lord Willberforce said:

> Negatively, fresh evidence ought not to be admitted when it bears on matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted, if some basic assumptions common to both sides, have been clearly falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice.

Thus with the new O. 55 r. 5A of the RHC 1980, an application to adduce fresh evidence at appeal stage only need to fulfill the two conditions as required under the said rule. The third condition/test as enunciated in *Ladd v. Marshall* need not be fulfilled under the said rule.

Applying The Test To The Present Case

First Test: It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

In the instant case, the trial proper was concluded when both parties closed their case on 28 March 2000. The respondent was supposed to submit his written submissions by 10 April 2000 and the appellant by 2 May 2000. Initially the date fixed for decision was 9 May 2000 (but was postponed a few times until 20 October 2000). When he gave evidence on 28 March 2000, the respondent informed the court that he was charged under s. 43(1) of the RTA 1987 over the same accident and he has not pleaded guilty to the charge and the case was still pending then. It was only on 4 July 2000 that the

respondent has pleaded guilty to the charge. So, the new evidence was totally not in existence when the trial was concluded. It existed a few months later and the appellant, after making a reasonable enquiry through his solicitors, only came to know about the matter on 7 June 2001. There is no opportunity for the appellant to make use of the evidence at the trial. The only avenue left for the appellant to rely on the said evidence is at the appeal stage in this court. In the circumstances, I am satisfied the evidence in question would not have been obtained with reasonable diligence for use at the trial of the case at the Sessions Court Temerloh. Thus the first test is cleared and fulfilled.

Second Test: The evidence must be such, if given, it would likely to have had a determining influence upon the decision of the case, although it need not be decisive.

In her grounds of decision, the learned Sessions Court judge has specifically stated that the respondent was charged under s. 43(1) of the RTA 1987 and the respondent has not pleaded guilty to the charge and the charge was still pending. This shows that the issue whether the respondent has pleaded guilty to the charge is a relevant consideration and was duly considered by the Sessions Court judge in making her decision on the liabilities of the parties.

In *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors* [1966] 1 MLJ 120, Raja Azian Shah J (as he then was) said at p. 121

> Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth's defendant's negligence, it is an admissible admission which supports the Plaintiff's case and which weighs against the fourth defendant.

In another case *Lim Ah Toh v. Ang Yau Chee & Anor* [1969] 2 MLJ 194, Raja Azlan Shah J (as he then was) again said:

> The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the Plaintiff's case and which weighs against the defendants.

In a recent case *Chang Chong Foo & Anor v. Shivanathan a/l Perumal* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 the Supreme Court has also held that it was proper for the learned judge to admit the evidence of the plea of guilty by the defendant in that case. Harun Hashim SCJ said:

> We are also of the opinion that the learned judge's finding that the defendant wholly negligent did not rest entirely on the admission of this evidence but on the totally of the evidence before him.

Applying those authorities to the facts of the present case, I am of the view that the said evidence, if true, would likely to have had a determining influence on the decision of the learned Sessions Court judge, although it need not be decisive. Thus the second test is also fulfilled.

(At this stage, both the conditions under O. 55 r. 5A of the RHC 1980 have been fulfilled and an order under the said rule may be made by the court).

Third Test: The evidence must be such as is presumably to be believed, or in other words, it must apparently be creditable, although it need not be incontrovertible.

The source of the said evidence is to be found in the notes of evidence and the charge sheet certified by the learned magistrate, Temerloh as well as a letter dated 7 June 2001 from Ibu Pejabat Polis Daerah Temerloh which were duly exhibited at p. 35 of the present application (encl. 9). These documents are official documents from the two departments ie, the court and the police. *Prima facie*, they must be presumably to be believed or in other words they must apparently be creditable, although they need not be incontrovertible. Thus, again I am fully satisfied that the third test is also fulfilled.

Whether The New Evidence Needs To Be Pleaded

The counsel for the respondent argued that the new evidence, that is the subject matter of this application ie, regarding the plea of guilty under s. 43(1) of the RTA 1987 by the respondent, must be pleaded in the statement of claim or an amended statement of claim; and since the said evidence was not specifically pleaded, then the application must be dismissed. With respect, I cannot agree with the counsel on this argument. In the first place, the said new evidence is to assist the appellant to prove negligence on the part of the respondent in causing the accident. It is not a separate and distinct issue by itself. It is only an evidence (additional evidence) to prove negligence on the part of the respondent. Thus, it is not necessary to plead the new evidence in the statement of claim or an amended statement of claim as suggested by the respondent's counsel. It is sufficient for the appellant to plead that the accident was caused by the respondent's negligence. These have been done in paras. 5 and 6 of the statement of claim.

Secondly, it is unreasonable and illogical to get the appellant to plead the said new evidence in this case when it was not in existence until the trial was closed. In fact, in his evidence on 28 March 2000, just before the trial was closed, the respondent had admitted that the charge against him under s. 43(1) of the RTA 1987 was pending and he had not pleaded guilty to the charge. The evidence only existed on 4 July 2000 when the respondent pleaded guilty at the Magistrate Court Temerloh (where the appellant or his counsel was not

a party to that proceeding). The appellant only came to know about the new evidence after receiving a letter from Ibu Pejabat Polis Daerah Temerloh on 7 June 2001. By that time, the learned Sessions Court judge had already given her decision on 20 October 2000 and the appellant had already filed his notice of appeal to this court. In the circumstances, no one in the position of the appellant, would be able to plead the said new evidence in his pleadings, if at all it need to be pleaded.

To support his contention on this issue, the respondent's counsel cited the case of *Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v. Johore Builders & Investments Sdn Bhd* [1996] 4 CLJ 184 as an authority. In that case the Court of Appeal refused leave to adduce further evidence on two main grounds: first, the issue of capacity in which the defendants had been sued (which was the subject matter of the further evidence) was one which never arose for determination in the court below as it was not pleaded anywhere in the defence, and secondly, the evidence in question was not put in although it was available at the trial. In that case, the appellants/defendants applied for leave to adduce fresh and further evidence at the appeal stage, on the issue of the capacity in which the defendants had been sued. The statement of claims alleged that the defendants were trading as a firm. That may have been true when the action was commenced. But there was no plea that the defendants were partners at all material times. In truth, they had been sued in their individual capacity. It was then proposed to adduce evidence at appeal stage to show that the defendants were not partners when the alleged liability accrued. Leave was refused. The issue in question in that case is not a mere evidence to prove a substantive allegation. It is a substantive allegation of fact, which need to be proved by other evidence during trial. Thus, it must have been pleaded in the first place. While in our present case, the new evidence that need to be adduced at appeal stage, purely an evidence to prove a substantive allegation of fact ie, the respondent's negligence which had been pleaded. In that case also, the evidence in question was available at trial and yet it was not put in. While in our present case, the evidence in question was not in existence until the trial was closed. In fact, in his evidence in court, the respondent had testified that he had not pleaded guilty to the charge under s. 43(1) of the RTA 1987 which was pending at the Magistrate Court Temerloh. In the circumstances, I am of the view that the case cited by the respondent does not help his contention that the said new evidence in the present case must have been pleaded.

Conclusion

The new evidence, which the appellant wished to adduce at the appeal stage, was really a new evidence ie, which was not in existence at the trial of the suit at the Sessions Court. The said evidence has satisfied all the conditions

under O. 55 r. 5A of the RHC 1980 as well as all the three conditions enunciated in *Ladd v. Marshall* and accepted by the Federal Court in *Lau Foo Sun*. In the premise, I allow the appellant's application for leave to adduce further evidence for consideration at the appeal proper and to facilitate that, I also allow the appellant to file additional appeal records containing the said further evidence outside time, ie, within (2) weeks from the date of this order, as applied in encl. 9.